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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| SAMUEL BROOKS, |) | |
| Employee |) | |
| |) | OEA Matter No. 1601-0316-10 |
| v. |) | |
| |) | Date of Issuance: March 3, 2015 |
| D.C. DEPARTMENT OF HEALTH, |) | |
| Agency |) | |
| _____ |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Samuel Brooks (“Employee”) worked as a Resource Development Specialist with the D.C. Department of Health (“Agency”). On April 29, 2010, Agency issued a termination notice removing Employee from his position. The notice provided that Employee was being terminated during his probationary period which commenced on May 11, 2009. The effective date of Employee’s termination was May 14, 2010.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on June 4, 2010. He argued that in accordance with *Holliday v. Metropolitan Police Department*, OEA Matter No. 1601-0046-09 (November 6, 2009), he became a permanent employee at the close of business on May 10, 2010. Employee further alleged that because Agency did not have a legitimate cause of action to remove him, as a permanent employee, its termination action was

¹ *Petition for Appeal*, p. 12-13 (June 4, 2010).

illegal.²

Agency filed its Answer to Employee's Petition for Appeal on July 8, 2010. It highlighted the challenges other Agency staff members experienced while working with Employee. Agency argued that these difficulties were outlined in Employee's performance evaluation. It provided that in light of Employee's performance, he was removed from his position during his probationary period. Agency asserted that its practice is to provide employees with two weeks' notice before termination to ensure that they can complete any outstanding projects. It explained that this is why the April 29, 2010 termination notice listed May 14, 2010, as the effective termination date.³ However, upon realizing that Employee would be removed after his probationary period ended, Agency contended that it executed a second notice removing Employee from his position effective May 7, 2010.⁴ Agency provided that Employee signed the acknowledgement receipt for the second notice. Therefore, his termination was valid.⁵

Before issuing his Initial Decision, the OEA Administrative Judge ("AJ") requested that the parties provide briefs on jurisdiction. Employee offered many of the same arguments presented in his Petition for Appeal. Additionally, he noted that his "Employee Clearance for Separation" form listed May 14, 2010, as his date of separation. Employee also asserted that he was paid his full salary through May 14, 2010, and he was not required to reimburse Agency for any overpayment of salary. As for the second removal notice, Employee claimed that Agency backdated the document. Accordingly, Employee explained that he became a Career Service

² *Id.* at 7.

³ This notice was signed by Dr. Pierre Vigilance, the Agency's Director.

⁴ This notice was signed by Kimberly Jefferies Leonard, the Chief Operating Officer.

⁵ *Agency's Answer*, p. 1-5 (July 8, 2010).

employee effective May 10, 2010.⁶

The AJ issued his Initial Decision on November 25, 2013. He held that in order for Agency to have properly terminated Employee, the termination action must have been done by someone with the authority to remove him prior to the end of his probationary period. The AJ provided that Agency failed to establish that Dr. Vigilance actually delegated authority to Kimberly Leonard in order to adequately effectuate the second notice of removal.⁷

Additionally, the AJ reasoned that Employee's termination must have actually occurred prior to the end of the probationary period. The AJ opined that otherwise, in accordance with D.C. Official Code § 5-105.04, after satisfactorily completing the probationary period, Employee had the equivalent of a permanent appointment therein. He considered that Agency paid Employee through May 14, 2010 and continued to make retirement contributions. Therefore, he ruled that Employee achieved permanent, career status.⁸ Accordingly, Agency's action was reversed, and it was ordered to reinstate Employee with back pay and benefits.⁹

Agency filed a Petition for Review on December 30, 2013. However, the petition offers no argument. It merely provides that Agency sought "review of the Initial Decision because it is based on an erroneous interpretation of statute, regulation[,] or policy." Contemporaneously, Agency filed a Motion for an Extension of Time to file its Memorandum of Points and Authorities in Support of its Petition for Review.¹⁰

On January 8, 2014, Employee filed a Motion Opposing Agency's Petition for Review. He argues that the petition should be dismissed because it failed to comply with OEA Rule 633.3

⁶ *Employee's Response to Order to Show Cause* (July 26, 2012).

⁷ *Initial Decision*, p. 4 (November 25, 2013).

⁸ The AJ also noted that despite being afforded the opportunity, Agency failed to argue that it had cause to remove Employee.

⁹ *Initial Decision*, p. 4-5 (November 25, 2013).

¹⁰ *Agency's Petition for Review* (December 30, 2013) and *Agency's Motion for an Extension of Time to Submit a Memorandum of Points and Authorities in Support of the Petition for Review* (December 30, 2013).

which requires that it contain actual objections supported by evidence in the record. Employee contends that because the statutory time limit to file an appeal is mandatory, then OEA is not at liberty to grant extensions of time to file.¹¹

On January 31, 2014, Agency filed its Memorandum in Support of the Petition for Review. It argues that there were still material issues that were in dispute. Agency claims that the outstanding issues were whether the amended notice was effective; whether Employee was Career Service; and whether OEA had jurisdiction. Therefore, it requests that the Initial Decision be vacated and remanded to the AJ with instructions to hold an evidentiary hearing.¹²

OEA Rule 633.3 provides the following:

The petition for review *shall set forth objections to the initial decision supported by reference to the record* (emphasis added). The Board may grant a petition for review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

As Employee provided, Agency's petition failed to offer any objections to the Initial Decision that were supported by reference to the record. This is a mandatory requirement for Petitions for Review filed before the OEA Board. Agency wholly failed to comply with this requirement by merely offering a one-sentence reason why it sought review of the Initial Decision.

As Employee asserted, this Board lacks the authority to grant any requests for extensions

¹¹ *Employee Brooks' Motion to Dismiss Petition for Review, Opposition to Agency's Motion to Enlarge Time for Filing Memorandum of Points and Authorities in Support of the Petition for Review and Answer* (January 8, 2014).

¹² *Agency's Memorandum in Support of the Petition for Review*, p. 3-4 (January 31, 2014).

for filing Petitions for Review. In accordance with OEA Rule 633.1 “any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision.” Furthermore, D.C. Official Code § 1-606.03(c) provides that “. . . the initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period.” The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) that “the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters.”¹³ Therefore, OEA has consistently held that the filing deadline is mandatory in nature.¹⁴

In the current case, the Initial Decision was issued on November 25, 2013. Although Agency filed its Petition for Review on the thirty-fifth day, the filing failed to comply with OEA Rule 633.3 by offering support of its position as referenced in the record. Agency did not file a complete Petition for Review until January 31, 2014. This was well past the thirty-five day deadline. It appears to this Board that Agency hurried to file something to meet the thirty-five day deadline in which its petition had to be filed. Agency then requested a one-month extension in which to amend its Petition for Review. This Board believes that Agency was aware that its initial Petition for Review was incomplete which is why it requested the extension to file its

¹³Also see *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C. 1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980)).

¹⁴*Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); and *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

detailed response to the Initial Decision. Because the filing requirements are mandatory, this Board does not have the authority to waive the requirement.¹⁵ Accordingly, Agency's Petition for Review is DISMISSED.

¹⁵ *Assuming arguendo* that this Board could consider the arguments raised in Agency's Memorandum of Points and Authorities, we would have considered them meritless. Agency claims that the outstanding issues were whether the amended notice was effective; whether Employee was Career Service; and whether OEA had jurisdiction. However, each of these issues was addressed with the Initial Decision. Agency simply disagrees with the AJ's determinations. This is not enough to warrant the reversal of the AJ's ruling.

ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **DISMISSED**. As provided in the Initial Decision, Agency's termination action is **REVERSED**. Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.